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-340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 72-340

PAUL F. CANTWELL, ET AL,
Petitioners,

vs.

BOARD OF TRUSTEES FOR UTILITIES and BOARD OF DIRECTORS FOR UTILITIES OF ITS DEPARTMENT OF PUBLIC UTILITIES OF THE CITY OF INDIANAPOLIS, IN THE NAME OF THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION OF THE STATE OF INDIANA, DOING BUSINESS AS CITIZENS GAS & COKE UTILITY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

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NAME OF THE CITY OF INDIANAPOLIS, A
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GAS & COKE UTILITY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND APPENDIX

Petitioners, Paul F. Cantwell, William R. Phillips, Mrs. Robert F. Wagner, Hubert Hester and alter Brown, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 30, 1972, affirming the order and judgment of the United States District Court for the Southern District of Indiana, Cale J. Holder, Judge, entered on April 16, 1971, dismissing the petitioners'

supplemental complaint, and that on hearing the order of dismissal be reversed.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. (Appendix pages A-1 through A-21) The opinion of the District Court dismissing the petitioners' supplemental complaint was not reported in the Federal Supplement; however, the Court of Appeals adopted the opinion of the District Court in its entirety and the opinion is set forth in the opinion of the Court of Appeals. (Appendix pages A-1 through A-21)

JURISDICTION

The judgment of the Court of appeals was entered on May 30, 1972. This Court has jurisdiction under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Whether Indiana Code 1971, 19-3-24-1, violates the guarantee of a republican form of government under Section 4, article IV, of the Constitution of the United States by providing for self-appointed board of trustees of the Department of Utilities of the City of Indianapolis.

2. Whether Indiana Code 1971, 19-3-24-1, denies the equal protection guaranteed by the Fourteenth Amendment by excluding the electors of the City of Indianapolis from either directly or indirectly, through an elected official, selecting the persons to be appointed to the

Board of Trustees of the Department of Public Utilities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved here are Section 4, Article IV, and the Equal Protection clause of the Fourteenth Amendment both of which are set out in the Appendix at page A-22.

The provisions of the Indiana statute involved here is Indiana Code 1971, 19-3-24-1, which is set out in the Appendix at pages A-22 through A-25, and the particular provision questioned is found at page A-24.

STATEMENT OF CASE

The Petitioners brought this action against the Respondents in a two-count complaint seeking in Count I thereof a declaratory judgment as to the constitutionality of Indiana Code 1971, 19-3-24-1, under Section 4, Article IV of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

Count II of the supplemental complaint realleged the allegation of Count I and sought injunctive relief in enjoining the Board of Trustees for Utilities and the Board of Directors for Utilities from further proceedings as such boards.

The theory advanced by the Petitioners as the unconstitutionality of the questioned statute was that because

of the provisions of the questioned statute that provided that at the expiration of the terms of the members of the Board of Trustees for Utilities of the Department of Public Utilities of the City of Indianapolis the Board of Trustees shall nominate the successors thereof to membership on the Board and that each of the nominees shall be appointed by the Mayor of the city within ten (10) days after the Mayor has received such nomination, the citizens of the City of Indianapolis were denied the guarantee of a republican form of government under the Guaranty Clause of the Constitution for the reason that the Petitioners, as electors within the City of Indianapolis, qualified to vote in elections for the Mayor of the City of Indianapolis did not, in fact, have any control either directly or indirectly over the appointment of the persons administering the department of the government of the City of Indianapolis.

The second theory on which the Petitioners sought to attack the questioned statute was that due to the isolation of the Board of Trustees for Utilities from control by a duly elected Mayor of the City of Indianapolis through the power of appointment, the Petitioners were denied the equal protection guaranteed under the Equal Protection Clause of the Fourteenth Amendment in that their vote for the Mayor of the City of Indianapolis has no weight at all in the matter of the selection of the persons to be appointed to the Board of Trustees.

The Petitioners brought the action as registered voters residing in the City of Indianapolis and as customers of the Department of Utilities for the City of Indianapolis seeking to represent a class of persons similarly situated.

The Respondents filed motions to dismiss based on the following reasons:

1. The District Court lacked jurisdiction of the subject matter.

2. Plaintiffs were not the real parties in interest under Rule 17(a), Rules of Civil Procedure.

3. The complaint failed to state a claim against Defendants on which relief could be granted.

The District Court in its Entry for the 16th day of April, 1971, sustained the motions to dismiss for the reason that the supplemental complaint failed to state a claim upon which relief could be granted.

The District Court, in its Entry of April 16, 1971, ruled against the Respondents' motions for dismissal on the grounds that Plaintiffs are not the real parties in interest pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. The District Court also ruled against the Respondents' motions to dismiss on the grounds that the Court lacked subject matter jurisdiction over the complaint. Therefore, the matter before the Court of Appeals on appeal was that portion of the entry below

which sustained the motions to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

The District Court was in error in sustaining the Defendants' motions to dismiss on the premise that a challenge to a state statute on the ground that it is inconsistent with the Guaranty Clause presents no justiciable question. It is only when the questions raised under the Guaranty Clause are not subject to judicially manageable standards that the Guaranty Clause presents no justiciable question. The statute challenged by the Petitioners clearly presents a question of judicially manageable standards in that the manner of the appointment of the Board of Trustees for Utilities by self-perpetuation under the terms of the statute removes the process of appointment from any person or authority which might be directly or indirectly responsible to the electors in the utility district. The authorities relied upon by the Court in its ruling involved questions as to the degree or form of republican form of government and did not involve the situation that exists in this case in which the republican form of government is completely absent.

The District Court erroneously sustained the motion to dismiss on the grounds that the challenged statute did

not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Equal Protection Clause has been held to extend to the rights of electors to have their votes counted and bear weight equally in the administration of government. Under the challenged statute the electors in voting for the Mayor of the City of Indianapolis are deprived of any effectiveness in the exercise of their franchise so far as the appointment of members of the Board of Trustees for Utilities is concerned for the reason that the Mayor himself is excluded from any exercise of choice or discretion in making the appointments under the mandatory terms of the statute.

Section 4, Article IV, of the Constitution of the United States provides as follows:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

That specific portion of the statute which the Petitioners seek to have declared unconstitutional is to be found at page A-22 through A-25 of the Appendix and is that clause of Indiana Code 1971, 19-3-24-1, which

regulates the nomination of the successors to the Board of Trustees of Utilities for the City of Indianapolis. The language provides very clearly that at the expiration of the respective terms of each member of the Board of Trustees the Board of Trustees shall nominate a successor to membership on the Board and that that nominee shall (emphasis added) be appointed by the Mayor of the City of Indianapolis within ten (10) days after receiving the nominations. No discretion is permitted to the Mayor of the City of Indianapolis in selecting the members of the Board of Trustees such discretion being vested solely in the Board of Trustees.

The Board of Trustees in turn appoint a seven member Board of Directors for Utilities which Board of Directors has the power of government, management, regulation, control and operation of the Department of Utilities. Indiana Code 1971, 19-3-24-1.

Petitioners contend that this manner of selecting the Board of Trustees contravenes the guarantee of a republican form of government under Section 4, Article IV, of the United States Constitution.

The first question that might be posed is what constitutes a republican form of government. It appears from the cases presented to the Supreme Court since Luther v. Borden, 49 U.S. (7 How.) 1 (1849) that a great number of

"forms" of government have been presented to the Supreme Court for review under the Guaranty Clause of Section 4, Article IV, of the United States Constitution; and, following the holding in Luther v. Borden, Supra, the Supreme Court has declined to decide the question presented in each case on the ground that the Guaranty Clause is not a repository of judicially manageable standards.

Although the Supreme Court has been reluctant to invoke the Guaranty Clause, it has on occasion taken the opportunity to engage in discourse upon the question.

In the case of In re Duncan, 139 U.S. 449, 461, 11 S. Ct. 573, 35 L. Ed. 219 (1890), the Supreme Court had this to say in discussing the republican form of governmen

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments National

and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulse of mere majorities."

One of the authors of The Federalist, James Madison, had this to say about a republican form of government in The Federalist No. 39:

"If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by

either or the tenures just specified; otherwise every government in the United States, as well as any other popular government that has been or can be well organized or well executed, will be degraded from the republican character."

The Federalist, No. 43, Page 281 (Modern Library 1937).

In The Federalist No. 44, Madison discusses the Guaranty Clause and the meaning of the Guaranty:

"But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

The Federalist, No. 44, Page 284 (Modern Library 1937).

The Court of Appeals in its entry for May 30, 1972, discussed the challenge to the statute under the Guaranty Clause and discoursed upon its determination that the challenge

presented no justiciable question in that portion of the opinion which appears on pages A-15 through A-19 of the Appendix. There the Court of Appeals discusses the ruling in Baker v. Carr, 369 U.S. 186, 262 (1962) which determined that the only significance that Luther v. Borden, Supra, could have for the immediate purposes of the Court was the holding that the Guaranty Clause was not a repository of judicially manageable standards which a Court could utilize in order to adjudge a state's lawful government. The Supreme Court then moved on in Baker v. Carr to determine that a justiciable question was presented under the Fourteenth Amendment of the United States Constitution as it applied to legislative apportionment.

At page A-16 of the Appendix the Court of Appeals cited several cases in which the Supreme Court had consistently refused to resort to the Guaranty Clause. In Taylor & Marshall v. Beckam (No. 1, 178 U.S. 548 (1900), the question tendered involved the contest of an election for the offices of governor and lieutenant governor in the State of Kentucky which had been submitted to the General Assembly of the State of Kentucky. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) attempted to question an initiation and referendum clause in the Oregon Constitution on the theory that such direct control by the people of the state constituted a pure democracy as distinguished from a republic. Kiernan v. Portland, 223 U.S. 151 (1912), involved

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an attack on an Oregon statute providing for ordinances by municipalities to carry into effect initiative and referendum provisions of the Oregon Constitution. Marshall v. Dye, 231 U.S. 250 (1913) concerned an attack on an Indiana statute which attempted to submit a new constitution to the electors of the state contrary to the provisions of the Indiana Constitution concerning amendments. O'Neill v. Leamer, 239 U.S. [illegible] (1915), was an attack on a Nebraska statute providing, among other things, for the election of a board of supervisors by the owners of land within the district. Ohio ex rel Davis v. Hildebrant, 241 U.S. 565 (1916), was an attack on an amendment to the Ohio Constitution permitting the initiation and referendum of laws by the electors in the state of Ohio. Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), attacked the implementation of a Washington statute for a workmen's compensation law in that state. Ohio ex rel Clarke v. Akron Metropolitan Park District, 81 U.S. 714 (1920), attacked an Ohio statute concerning the creation and government of park districts on petition to a probate judge. Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937), was an attack on a Virginia statute providing for a milk commission with powers to establish marketing districts and govern the marketing of milk in those districts.

In none of the cases above was the question ever raised as to the complete absence of some control either directly or indirectly by the electors in the particular "form" of government being attacked. In the present case, the language

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of the challenged statute clearly precludes any voice directly or indirectly by the electors in the selection of the members of the Board of Trustees for Utilities in the City of Indianapolis.

Petitioners content that a justiciable question can exist under Section 4, of Article IV of the Constitution of the United States when the question is the non-existence of a republican form of government as opposed to the choice between two republican forms of government such as was presented to the Supreme Court in Luther v. Borden, Supra, where the Court was asked to choose between the government of Rhode Island founded on a royal charter existing at the time Rhode Island was admitted to the Union, and the government established under a constitutional convention called in 1841.

In the case of Kohler et al v. A. P. Tugwell et al, 393 U. S. 531 (1969), the Supreme Court, in a memorandum decision, did Per Curiam affirm the decision of a lower court found at 292 F. Supp. 978. (U.S.D.C. La. 1968). In Kohler v. Tugwell, Supra, the concurring opinion of Wisdon, Circuit Judge, Boyle District Judge joining, discusses the occasions on which a justiciable question might be presented under the Guaranty Clause. The opinion advanced the proposition that the standards which the court found to be judicially manageably under the Equal Protection Clause of the Fourteenth Amendment would be applicable also in determing whether or not the people were deprived of the fundamental rights

inherent in a republican form of government. The judge then concluded the opinion with the following observation on the future of the Guaranty Clause:

"The line of judicial development of the republican guarantee, bent and broken since Luther v. Borden, is not beyond repair. Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as judicially nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism. James Madison best stated the case for Article IV, Section 4. He regarded it as the basis for the doctrine of federal interposition:

> 'It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States,

by the agitation of enterprising leaders, or by the intrigues and influence of foreign powers?' (Emphasis added.)" (Footnotes omitted)

A statement in Baker v. Carr, supra, to the effect that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize in order to determine whether a state government was republican in character, was explained in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) as follows:

"Petitioners ... contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such representation is politically sufficient to establish a 'republican form of government'. As we stated in Luther v. Borden, ... questions political under the Guaranty Clause are not justiciable, where 'political' is used as it was in the early decisions of judicially manageable standards."

The fact that we have held that notwithstanding congressional approval of state legislative apportionment at the time of admission into the Union which deviates from equal population principles, the Equal Protection Clause does not require strict compliance with the equal population principle in legislative apportionment.

Appellees attempt to distinguish the challenged statute from the statutes of the City of Indianapolis

which comprises the utility district, Indiana Code 1971, 19-3-24-6 (the text is to be found in the Appendix at page A-25) to participate in any way in the selection of this particular department of government of the City of Indianapolis. Such a form of government can not possibly be said to be a republican form of government as defined by Madison in The Federalist No. 39, Supra, and as defined by the Supreme Court in In re Duncan, Supra.

In discussing the Guaranty Clause, Madison stated that the only restriction imposed by the Constitution was that an anti-republican form could not be substituted for a republican form. The Federalist No. 44, Supra. Therefore, the question before this court is whether or not under such circumstances, the absence of a republican form of government within a department of the City of Indianapolis gives rise to judicially manageable standards under which the Guaranty Clause guarantees can be invoked. In all of the cases heretofore cited as following Luther v. Borden, question presented to the court was one of degree between two forms of government which were in some way responsible to the electors. It is respectfully submitted that the statement from Sailors v. Board of Education, 387 U.S. 105 (1967)(Appendix page A-34) to the effect that viable local government may need many innovations, numerous combinations of old and new services, great flexibility in municipal arrangements to meet changing urban conditions and that nothing in the constitu-

tion prevents such experimentation does not apply in the situation where there is a complete absence of a republican form of government.

Petitioners contend that under the Guaranty Clause of the Constitution that direct or indirect control of the selection of the Board of Trustees for Utilities of the Department of Public Utilities of the City of Indianapolis through an elected official is mandated. The guarantee of a republican form of government does require that such a branch of government be administered by individuals who are responsible to public officers.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Mayor of the City of Indianapolis is elected by th-

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qualified electors residing within the boundaries of the city, and he in turn in administering the city government has broad appointive powers to permit him to select those persons who will be charged with administrative responsibilities in various departments of the city government and also in the appointment of members of administrative boards and other public authorities which exercise jurisdiction within the same geographical territories. There is one exception to the mayor's appointive powers found in Indiana Code 1971, 19-4-24-4 which mandates the mayor to appoint the successor trustees nominated by the Board of Trustees for facilities in the City of Indianapolis.

In the exercise of the franchise the electors in voting for the mayor do in some degree influence the administration of those departments and boards to which the mayor has appointive power; and,to the extent that the electors are vested with the right to vote for the mayor of Indianapolis, they in turn have some indirect influence on the government administered by the various departments to which the mayor controls appointments.

The power of appointment of an elected official when coupled with the right of the electors to exercise the franchise in the choice of that elected official gives effect to the franchise which would not exist if the power of appointment were denied to the elected official. One of the most

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pertinent examples of the result of the exercise of the franchise in selecting an elected official which in turn results in a modification of policy or direction in another branch of government is that of the election of President Nixon and his subsequent appointments to the Supreme Court of the United States. Although the electors of the United States do not vote for the Justices of the United States Supreme Court, they can indirectly through the exercise of their franchise influence the direction of the Court.

In a case involving an Ohio statute which had the practical effect of excluding all but the Republican and Democratic parties from the ballots in Ohio elections, the Supreme Court rejected the argument that the political question was involved merely because the right sought to be protected involved political preferences. There the Court stated that invidious distinctions cannot be enacted without a violation of the Equal Protection Clause and in determining whether or not a state law violates the Equal Protection Clause the Court must consider the facts and circumstances behind the law, the interest which the state claims to be protecting and the interest of those who are disadvantaged by the classification. The Court further stated that no right is more precious in a free country than that of having a voice in the election of those who make the laws and that other rights, even the most basic are illusory if the right

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to vote is undermined. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Also in Reynolds v. Sims, 377 U.S. 533, 555 (1964), the Court stated that the right to vote freely for the candidate for ones choice is of the essence of a democratic society and any restriction on that right strikes at the heart of a representative government and the right of suffrage can be denied by debasement or delusion of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 55, (1970), the court stated that while there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. The Court also refused to distinguish between legislative officials and administrative officers for the reason that governmental activities cannot be easily classified in the neat categories favored by civics text.

The Court of Appeals in its entry of May 30, 1972, relies heavily upon Sailors v. Board of Education, 387 U.S. 105 (1967). That case involved the question of the appointment of a board of education by the elected officials of school boards lying within the county, and, therefore, does not apply in this case which the question raised is that no one on the Board of Trustees is appointed by an elected official.

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In removing the Board of Trustees for Utilities in the City of Indianapolis from the control of any elected official, the electors of the City of Indianapolis are denied full effect of the franchise which they exercise in the election of the Mayor of the City of Indianapolis, therefore, they are denied equal protection under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons above set forth the Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 30, 19 72

Before

Hon. F. RYAN DUFFY, Sr. Circuit Judge

Hon. ALFRED P. MURRAH, Sr. Circuit Judge *

Hon. WILLIAM G. JUERGENS, District Judge **

PAUL F. CANTWELL et al.
Plaintiffs-Appellants
v.
BOARD OF TRUSTEES FOR UTILITIES AND BOARD OF DIRECTORS FOR UTILITIES OF its Department of Public Utilities of the City of Indianapolis, in the Name of the City of Indianapolis, a Municipal Corporation of the State of Indiana, Doing Business as CITIZENS GAS & COKE UTILITY, et al.
Defendants-Appellees.

No. 71-1468

Appeal from the United States District Court for the Southern District of Indiana

Cale J. Holder, Judge
No. 70-CR-302

ORDER

Argued February 16, 1972

This suit is before us appealing the dismissal by the District Court of a supplemental complaint for a de-

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(*) Senior Circuit Judge Alfred P. Murrah of the Tenth Circuit is sitting by designation.
(**)Chief District Judge William G. Juergens of the Eastern District of Illinois is sitting by designation.

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claratory judgment and injunctive relief. Specifically, plaintiffs, as a class, requested declaratory relief with respect to the constitutionality of certain provisions of the Indiana Code of 1971 providing for succession of members on the "Board of Trustees for Utilities" in "cities of the first class" in Indiana, and furthermore, requested the Court to enjoin certain defendants from doing business as Citizens Gas & Coke Utility with a receiver to operate the utility pendente lite.

The motion to dismiss filed by defendants was succeeded by the order of the District Court on April 16, 1971, dismissing the supplemental complaint from which plaintiffs appeal.

The controlling state statutes[1/] were enacted by the Indiana General Assembly to provide a method whereby the City of Indianapolis and other Indiana cities of the first class could hold legal title to the gas utility trust assets, beneficially owned by the residents of the cities, and to provide for management of the utility plants.

Plaintiffs argue that the statute sections deny

1/ Indiana Code of 1971, Secs. 19-3-24-1 and 19-3-24-10.

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them their right to a Republican form of government under the Guaranty Clause of the Fourth Amendment of the United States Constitution; that the statute also denies them equal protection of the laws under the Fourteenth Amendment.

We disagree with these contentions of the plaintiffs. We fully agree with the well-drafted order and decision of District Judge Holder. Since the order and decision has not been printed in the Federal Supplement, we attach hereto a copy of Judge Holder's order of April 16, 1971 and adopt it in its entirety as though it were our own.

The order and judgment of the District Court is

A F F I R M E D

ENTRY OF APRIL 16, 1971 SUSTAINING
MOTIONS TO DISMISS

The matters of the motion to dismiss filed by all defendants, except the defendant, Richard G. Lugar, on March 20, 1970, and the motion to dismiss filed by the defendant, Richard G. Lugar, on March 23, 1970, and refiled as to the March 24, 1971 supplemental complaint on March 29, 1971 and March 31, 1971, respectively, came on before the Court for ruling. The Court, having read and considered the motions, the supporting brief filed on March 20, 1970, and refiled on March 29, 1971, by all defendants, except Richard G. Lugar, the plaintiffs' September 15, 1970 answer brief (deemed by the Court to have been refiled subsequent to the filing of the supplemental complaint), and the reply

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brief filed on September 30, 1970 (and refiled on March 29, 1971) by all defendants except Richard G. Lugar, and being otherwise duly advised in the premises, does now submit its ruling.

The defendants' motions to dismiss are hereby SUSTAINED for the reason that the supplemental complaint fails to state a claim upon which relief can be granted. It is, therefore, ORDERED and ADJUDGED that the above entitled cause be and is hereby DISMISSED, with costs of the action to be assessed against the plaintiffs.

The plaintiffs commenced this action by the filing of a two count complaint on February 27, 1970 which was superseded by a supplemental complaint filed on March 24, 1971. Plaintiffs purport to bring this action as representatives of a class of persons numbering in excess of 300,000 of which plaintiffs are members. Count I of the supplemental complaint is an action for declaratory relief; Count II of the supplemental complaint is an action for injunctive relief. Both counts challenge the constitutionality of certain provisions of the Indiana Code of 1971 providing for succession of members on the "Board of Trustees for Utilities" in "cities of the first class." The challenged provisions provide in relevant part as follows:

"Chapter 24. Departments of Public Utilities in First-Class Cities.

"Sec. 1. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled 'An act concerning municipal corporations,' approved March [illegible],

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1905, and acts amendatory thereof and supplemental thereto, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall have as its head and be under the general supervision and control of a board of seven (7) members, to be known as the 'Board of Directors for Utilities,' to be appointed annually by the board herein provided for and designated as the 'Board of Trustees for Utilities.'

"****.

"BOARD OF TRUSTEES--EXPIRATION OF TERM--
[illegible]--PROCEDURE

"At the expiration of the respective terms of each of the members of the board of trustees so originally appointed, the said board of trustees shall nominate the successors thereof to membership on such board, each of which nominees shall be appointed by the mayor within ten (10) days after receiving such nominations, and each succeeding member shall serve for a term of four (4) years. In the event any person who has been appointed at any time as a member of such board of trustees shall fail to qualify within ten (10) days after the mailing to him of notice of his appointment, or if any member after qualifying shall die, resign, vacate such office by becoming a nonresident of such city, or be removed as hereinafter provided; new members of such board of trustees shall be chosen to fill such vacancy in the same manner as is provided for the member in whom such vacancy occurs, and the member so chosen shall serve for the remainder of the term for which the member whose place is so filled was appointed.

"****."

Indiana Code [illegible] 54-24-1.

Bureau of formalities Count I of the complaint alleges that plaintiffs reside in Indianapolis, Indiana; that plaintiffs are registered voters therein; that plaintiffs are customers of the defendant utility, Indiana Gas & Coke Utility, [illegible] for natural gas provided by said utility at rates fixed by the [illegible] Service Board of Indiana; that the Board of

Directors for Utilities of the Department of Public Utilities for the City of Indianapolis *** have (sic) the power to levy taxes *** upon the plaintiffs *** and the class they represent" [1,2]; that members of the Board of Trustees for Utilities and of the Board of Directors for Utilities are in fact officials of the municipal government of Indianapolis; but that pursuant to the terms of §19-3-24-1 of the Indiana Code

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Footnote 1. It appears from the complaint that plaintiffs seek to bring this action on behalf of all persons who are both customers of Citizens Gas & Coke Utility and registered voters residing in Indianapolis, Indiana.

Defendants contend that plaintiffs "have failed to bring themselves within the minimal conditions for the maintenance of a Rule 23 class action." The Court does not reach this issue, having decided that the complaint must be dismissed for the reasons set out below.

Footnote 2. Indiana Code of 1971 §19-3-24-10 confers a limited taxing power upon the Board of Directors, which section provides, in part, as follows:

> "Sec. 10. For the purpose of raising money to pay all bonds issued as provided in section eight, and the interest thereon, to the extent that moneys are not available therefor in the judgment of the board of directors for utilities from the operations of said utility plant or plants so owned by said city, the board of directors for utilities, as an official board of said utility district, is hereby empowered to levy, and shall levy each year, a special tax upon all the property of said utility district in such manner as to meet and pay the principal of said bonds as they severally mature, together with all accruing interest thereon. ***."

of 1971, the plaintiffs are denied the right to vote for an elective official with the power of appointment over the Board of Trustees: that the nomination and appointment of successor members on the Board of Trustees in the manner provided in §19-3-24-1 constitutes a denial of the constitutional guarantee of a republican form of government to the plaintiffs. Federal Constitution, Article 4, §4 5.; that the Board of Directors, although not directly responsible to an elected representative of the plaintiffs, has the power to levy taxes upon the plaintiffs, which power constitutes taxation without representation in violation of the Due Process Clause of the Fourteenth Amendment; wherefore, the plaintiffs pray that the Court declare (1) that such portion of §19-3-24-1 as provides for the nomination and appointment of members of the Board of Trustees is unconstitutional, (2) that the office of each member on the Board of Trustees and on the Board of Directors shall be vacated, and (3) that the Court shall retain jurisdiction of the cause pending enactment of corrective legislation. Count II realleges all of the allegations of Count I and further alleges that defendant Boards

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5. Although it is not specifically apparent from the complaint, plaintiffs' September 15, 1972 reply brief at pages 4 and 5 discloses that the plaintiffs do not challenge the constitutionality of that part of §19-3-24-1 which provides for the annual appointment of trustees by the Board of Directors by the Board of Trustees. The plaintiffs contend only that the denial of the right to vote for an elective official with the power of appointment over the Board of Trustees constitutes a violation of the Guaranty Clause.

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are actively engaged in the mismanagement of the utility and are likely to continue to do so and seeks to have the Court enjoin the Boards from doing business as Citizens Gas & Coke Utility and to appoint a receiver to operate the utility pendente lite.

Upon the filing of the original complaint on February 2[illegible], 1970, Cause Number IP 70-C-121 was drawn and the cause assigned to the docket of Chief Judge William E. Steckler. Judge Steckler set the matter down for a hearing in his chambers on March 18, 1970 and, at the hearing, directed Robert V. Bridwell, one of the attorneys for the plaintiffs, to prepare a memorandum of the matters discussed, which memorandum has never been filed. Immediately following the hearing, Judge Steckler disqualified himself as presiding Judge because of a possible conflict of interest, and the cause was transferred to the docket of Judge Dale J. Holder. Thereafter motions to dismiss were filed by the defendants on March 20, 1970 and March 23, 1970 with a supporting brief being filed with the March 20, 1970 motion. Nearly four months later, on July 17, 1970, plaintiffs belatedly moved for an enlargement of time in which to oppose the motions to dismiss, which the Court, in its discretion, granted on July 20, 1970.[4] The plaintiffs'

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[4] On July 21, 1970 and apparently before receipt of the Court's July 20, 1970 entry, the defendants filed a memorandum in opposition to plaintiffs' motion for enlargement of time on the grounds that the motion was not timely and further noting that Attorney Bridwell had not filed the memorandum of matters discussed at the March 18, 1970 hearing. In view of the [illegible] entry of July 20, 1970, the issued raised in the brief were moot.

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answer brief was filed on September 15, 1970 and defendants' reply brief, on September 30, 1970. Subsequent to the enactment of the Indiana Code of 1971 on January 19, 1971 plaintiffs, with leave of Court, filed a supplemental complaint on March 24, 1971. Upon petitions of the defendants, the motions to dismiss and briefs were ordered refiled as to the supplemental complaint on March 30, 1971 and March 31, 1971, respectively.

The grounds for dismissal alleged in both motions are identical: (1) That the plaintiffs are not the real parties in interest pursuant to Rule 17(a) of the Federal Rules of Civil Procedure; (2) That the Court lacks subject matter jurisdiction over the complaint; and (3) That the complaint fails to state a claim upon which relief can be granted.

The Court deals first with the defendants' motions to dismiss as they apply to Count I of the complaint.

1. Defendants contend that the complaint should be dismissed because the plaintiffs do not have standing to maintain this action for the reason that the plaintiffs are not the real parties in interest. Specifically, defendants contend that the complaint is an action to enforce the terms of a public charitable trust and that the Attorney General of Indiana, not the plaintiff beneficiaries, is the proper party to enforce the terms of the trust. It is well established, both that the property of Citizens Gas & Coke Utility is that of a public charitable trust, Todd v. Citizens Gas Company of Indianapolis, 46 F.2d 873 (7 Cir. 1931); Williams v. Citizens

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Gas Co., 206 Ind. 448 (1935); Chase National Bank v. Citizens Gas Company, 115 F.2d 217 (7 Cir. 1940) and, that, under Indiana Law, the Attorney General of Indiana is the proper party to enforce the terms of a charitable trust, Boice v. Williams, 121 Ind.App. 210 (1951). However, defendants are in error in construing Count I of the complaint to be an action for the enforcement of the terms of a charitable trust. Count I does not set out any of the terms of the trust nor does it allege that the action is founded upon any of the terms of the trust. To the contrary, it clearly purports to challenge the constitutionality of the Indiana Code of 1971 as amended insofar as that section provides for the succession of members to the Board of Trustees in a manner that is not directly responsive to the electorate. Count I of the present action is not one to enforce the terms of a charitable trust.

If the plaintiffs were to prevail upon the merits of Count I, it might then be necessary for the Attorney General of Indiana to bring an action in equity in the State Court system to have the terms of the trust modified to conform to constitutional requirements. For the reasons set out below, however, the Court holds that Count I of the complaint fails to state a claim upon which relief can be granted and that it will not exercise pendent jurisdiction over that portion of Count II which seeks relief from the defendants' alleged "mismanagement" of the utility.

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2. Defendants also contend that the Court lacks jurisdiction over the subject matter of the complaint for the reason that the plaintiffs have failed to allege a minimum jurisdictional amount in controversy. Count I alleges that this action is "brought under the terms of 28 U.S.C. Section 1343 and 28 U.S.C. Section 1331(a)" but does not allege that the matter in controversy exceeds the sum or value of $10,000.00.[5]

Footnote 5. Plaintiffs' answer brief argues that jurisdiction is founded on 28 U.S.C. §1331(a) and 28 U.S.C. §1343(3). Sections 1331(a) and 1343(3) provide as follows:

> "§1331. Federal question; amount in controversy, costs
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
>
> ***."

> "§1343. Civil rights and electric franchise
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ***;
>
> (3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> ***."

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Plaintiffs take the position that no minimum jurisdictional amount need be alleged in a suit to enforce or protect a personal right arising under the Constitution, laws, or treaties of the United States. Defendants concede that no jurisdictional amount need be pleaded in an action to enforce or protect personal rights, but contend that the present action is one to enforce a property or monetary right as shown by the fact that plaintiffs bring this action as taxpayers residing within the utility district [6.] and as subscribing customers of the defendant utility. The fact that plaintiffs describe themselves in part [7.] as taxpayers in the utility district and as customers of the defendant utility is not

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Footnote 6. Indiana Code of 1971 §19-3-24-6 provides as follows:

"Sec. 6. Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory included within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines of utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act."

Footnote 7. Plaintiffs also allege that they are qualified voters, residing within the City of Indianapolis, Indiana.

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determinative of the jurisdictional question presented with respect to Count I, that is, whether the plaintiffs' action is one to protect a personal right or a property right. The right which the plaintiffs seek to enforce in Count I is the alleged right to vote for an elected official with a power of appointment over the Board of Trustees. The plaintiffs ask the Court to exercise its equitable powers to enforce this right but do not seek monetary damages. The Court now holds that if the qualified voters who reside in the utility district have a constitutional right to have the successor members of the Board of Trustees appointed in a certain manner, that right is a personal right and not a property right. The defendants have cited no authority to the contrary. The Court further holds that it does have subject matter jurisdiction over the plaintiffs' action for the enforcement of an alleged personal right arising under the Constitution pursuant to 28 U.S.C. §1343(3)[8], even in the absence of any allegation of a certain monetary value being in controversy. See Hague v. CIO, 307 U.S. 496 (1939).

The defendants also contend that the Court does not have subject matter jurisdiction over the action because the right sought to be enforced arises under the Guaranty Clause. An

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Footnote 8. Absent an allegation of a minimum jurisdictional amount in controversy the plaintiffs have not properly alleged jurisdiction under 28 U.S.C. §1331(a). See Hague v. CIO, 307 U.S. 496 (1939).

The defendants also contend that the Court does not have subject matter jurisdiction over the action because the right sought to be enforced arises under the Guaranty Clause. An action to enforce a constitutional right arising under the Guaranty Clause raises a question of justiciability, not of jurisdiction. Baker v. Carr, 369 U.S. 186 (1962).

4. Finally, the defendants contend that the complaint fails to state a claim upon which relief can be granted. Plaintiffs attempt to support their claim that the Indiana Code of 1971 §19-3-24-1 is unconstitutional on three theories. The first theory is that §19-3-24-1 in its present form constitutes a denial of a republican form of government in violation of the Guaranty Clause. Secondly, plaintiffs contend that §19-3-24-1 violates the Equal Protection Clause. The third theory is that §19-3-24-1 permits "taxation without representation" in violation of the Due Process Clause of the Fourteenth Amendment.

With respect to the first theory, the defendants contend that a challenge to a state statute on the ground that it is inconsistent with the Guaranty Clause presents no justiciable question. The Court agrees. In Baker v. Carr, 369 U.S. 186, [illegible] (1962), the Supreme Court reviewed its holding in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), that "the Guaranty Clause is not a repository of judicially manageable standards," and noted that since Luther v. Borden it has consistently refused to resort to the Guaranty Clause as the source of a constitu-

tutional standard for invalidating state action, citing Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Pacific States Tel. & T. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. Portland, 223 U.S. 151 (1912); Marshall v. Dye, 231 U.S. 250 (1913); O'Neill v. Leamer, 239 U.S. 244 (1915); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937).

In their September 15, 1970 answer brief (deemed to have been refiled after the filing of the supplemental complaint), plaintiffs also contend that "*** Hadley v. the Junior College District of Metropolitan Kansas City (sic) (397 U.S. 50 (1970)) does have a bearing on the matter here in that the extension of equal protection guarantees to the level of local government was confirmed." This statement is the only indication that plaintiffs are seeking to attach S19-3-24-1 as violative of the Equal Protection Clause of the Fourteenth Amendment. However, the Court concludes that any such reliance on the Equal Protection Clause by the plaintiffs is misplaced. In Avery v. Midland County, 390 U.S. 474, 484-485 (1968), the Supreme Court held that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."

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Last term, the Supreme Court held the "one man, one vote" principle to be applicable to the election of trustees of the Junior College District of Metropolitan Kansas City, Missouri, pursuant to the Equal Protection Clause, Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970). In Hadley, the appellants argued that the "one man, one vote" principle was constitutionally required under the holding in Avery because the junior college trustees could exercise "general governmental powers over the entire district" since the trustees were empowered to levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school district, acquire property by condemnation, and manage the operation of the junior college generally. The Supreme Court agreed with the appellants in Hadley that the powers of the trustees were general enough and had sufficient impact throughout the district "to justify the conclusion that the principle which we applied in Avery should be applied here." 397 U.S. 54. However, the Supreme Court's holding that the "one man, one vote" principle was applicable to the election of the trustees was not based upon the Court's finding that the office of junior college trustee was more "legislative" than "administrative" in nature. The Court expressly stated that it could not perceive any "judicially manageable standards" to aid in the making of such distinctions. 397 U.S. 55. The Court

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merely held that once "a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. 56. The Supreme Court then noted that it had previously held that "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection. Sailors v. Board of Education, 387 U.S. 105 (1967)." Quoting further from Sailors the Supreme Court approved its previous statement that "'viable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.'" 397 U.S. 58-59.

In the present cause, the Board of Directors has a limited bonding and taxing power, and the Board of Trustees and the Board of Directors have other general powers which relate almost exclusively to the management of public utilities.[9]

Footnote 9. See Indiana Code of 1971, §§19-3-24-1 through 19-3-24-18, especially §§19-3-24-8 through 19-3-24-11, §§19-3-24-19 through 19-3-24-24.

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where local government officials are not selected by popular vote, the "one man, one vote" principle does not apply. Where, a State delegates less than full governmental powers to non-elected local officials, the Court lacks any judicially manageable standards to determine whether such delegation of power constitutes a violation of the Guaranty Clause. Baker v. Carr, 369 U.S. 186 (1962); Avery v. Midland County, 390 U.S. 474 (1968); Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970). The Court, therefore, holds that Count I of the plaintiffs' complaint fails to state a claim upon which relief can be granted under the Guaranty Clause because the facts of the case present a non-justiciable question. The Court further holds that Count I fails to state a claim upon which relief can be granted under the Equal Protection Clause for the reason that the Equal Protection Clause principle of "one man, one vote" is not applicable when a local governmental official is selected by other than popular vote. Sailors v. Board of Education, 387 U.S. 105 (1967).

Under their third theory, plaintiffs allege that the empowering of an appointed official who is not directly responsive to the electorate with a power of taxation constitutes "taxation without representation" in violation of the Due Process Clause of the Fourteenth Amendment. The Court finds

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Footnote 10. Cf. Heald v. District of Columbia, 259 U.S. 114 (1922).

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however, does not allege that the defendants have ever exercised the limited taxing power conferred upon them by the Indiana Code of 1971 §19-2-24-10 or that the defendants propose to do so. In the absence of any such allegation, Count I of plaintiffs' complaint does not present a "concrete legal issue" for adjudication. "A hypothetical threat is not enough." United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947). The Court concludes that, with respect to the third theory of action under the Due Process Clause, the plaintiffs have failed to allege facts showing that a "case" or "controversy" exists over which the Court has jurisdiction.

The above holdings are equally applicable to Count II of the complaint to the extent that Count II realleges all of the allegations of Count I. To the extent that Count II of the complaint alleges a state cause of action for enforcement of a public charitable trust, the Court declines to exercise jurisdiction, and Counts I and II are, therefore, both dismissed. It is doubtful whether this Court has the power to exercise pendent jurisdiction over a state cause of action where the Federal claims are dismissed before trial. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). It is clear, however, that the Court need not exercise its power of pendent jurisdiction in every case in which it is found to exist. Pendent jurisdiction is a doctrine of discretion. 383

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U.S. at 726. The Court's decision to decline the exercise of pendent jurisdiction in the present case is buttressed by the fact that the plaintiffs would not be the real parties in interest in an action against the defendants for mismanagement of a public charitable trust. Such an action must be brought by the Attorney General of Indiana.

Dated this 15 th day of April, 1971.

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PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION

Section 4, Article IV, of the Constitution of the United States provides as follows:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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PERTINENT PROVISIONS OF THE INDIANA STATUTES

Indiana Code 1971, 19-3-24-1

Chapter 24. Departments of Public Utilities in First-Class Cities.

Sec. 1. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporation(s)," approved March 6, 1905, and acts mendatory thereof and supplemental thereto, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall have as its head and be under the general supervision and control of a board of seven (7) members, to be known as the

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ard of Directors for Utilities," to be appointed annually
the Board herein provided for and designated as the "Board
Trustees for Utilities."

BOARD OF TRUSTEES FOR UTILITIES-MEMBERS-APPOINTMENT-TERMS

Said Board of Trustees for Utilities, as originally con-
uted, shall consist of five (5) members, two (2) of whom
ll be chosen and appointed by the mayor of such city of
first class [illegible] (2) of whom shall be appointed by the
on nomination of the judge of the circuit court of the
nty in which said city is situated; and one (1) of whom
ll be appointed by the mayor on nomination of the city
uncil. Such appointments shall be made within sixty (60) days after this act
omes effective. In the case of cities hereafter falling
into the class for the first time prescribed, sixty (60) days after
publication by the United States census establishing such
population, the common council of such city, and the judge of
the circuit court of the county in which said city is located,
shall transmit in writing to the mayor of such city of the
first class their respective nominations of members of said
Board of Trustees for Utilities, and the mayor shall appoint
the nominees to membership on such board not later than ten
(10) days after the expiration of said sixty (60) day period.
At the same time such mayor shall appoint the two (2)
members to be appointed by him himself. In such original appoint-
ments of members to be chosen by the mayor, one (1) shall be
appointed for a period of three (3) years and one (1) for a

period of four (4) years from the date of such appointment; the trustees nominated by the city council shall be appointed for a period of two (2) years from the date of such appointment; of the two (2) to be nominated by the judge of the circuit court, one (1) shall be appointed for a period of one (1) year, and one (1) for a period of four (4) years.

All such trustees and all successors thereof shall hold over after the expiration of their terms until their respective successors have been duly appointed and have qualified.

BOARD OF TRUSTEES-EXPIRATION OF TERMS-NOMINATIONS FOR NEW TERMS-PROCEDURE

At the expiration of the respective terms of each of the members of the Board of Trustees so originally appointed, the said Board of Trustees shall nominate the successors thereof to membership on such board, each of which nominees shall be appointed by the mayor within ten (10) days after receiving such nominations, and such succeeding members shall serve for a term of four (4) years. In the event any person who has been appointed at any time as a member of such Board of Trustees shall fail to qualify within ten (10) days after the mailing to him of notice of his appointment; or if any member after qualifying shall die, resign, vacate such office by becoming a nonresident of such city, or be removed as hereinafter provided; new members of such Board of Trustees shall be chosen to fill such vacancy in the same manner as is provided for

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the member as to whom such vacancy occurs, and the member so chosen shall serve for the remainder of the term for which the member whose place is so filled was appointed.****

Indiana Code 1971, 19-3-24-6

Sec. 6. Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory included within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines of utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act.

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